

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRYAN K. STURM,)	
)	No. CV-08-0353-CI
Plaintiff,)	
)	ORDER GRANTING IN PART
v.)	PLAINTIFF'S MOTION FOR SUMMARY
)	JUDGMENT AND REMANDING TO THE
MICHAEL J. ASTRUE,)	COMMISSIONER FOR ADDITIONAL
Commissioner of Social)	PROCEEDINGS PURSUANT TO 42
Security,)	U.S.C. § 405(g)
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 17, 19.) Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney Nancy Mishalanie represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C. § 405(g).

Plaintiff protectively filed for Supplemental Security Income (SSI) on May 20, 2006. (Tr. 61.) He alleges disability due to "arthritis, lumbar, hands, feet, mental and PTSD [post traumatic stress disorder]," with an onset date of July 1, 2005. (Tr. 80-81.) Following a denial of benefits at the initial stage and on reconsideration, a hearing was held before Administrative Law Judge (ALJ) Richard Say on July 26, 2007. (Tr. 21-43.) Plaintiff, who

1 was represented by counsel, and vocational expert Daniel McKinney
2 (VE) testified. On September 25, 2007, ALJ Say denied benefits;
3 review was denied by the Appeals Council. (Tr. 1-4, 7-20.) This
4 appeal followed. Jurisdiction is appropriate pursuant to 42 U.S.C.
5 § 405(g).

6 STANDARD OF REVIEW

7 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
8 court set out the standard of review:

9 The decision of the Commissioner may be reversed only if
10 it is not supported by substantial evidence or if it is
11 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
12 1097 (9th Cir. 1999). Substantial evidence is defined as
13 being more than a mere scintilla, but less than a
14 preponderance. *Id.* at 1098. Put another way, substantial
15 evidence is such relevant evidence as a reasonable mind
16 might accept as adequate to support a conclusion.
17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
18 evidence is susceptible to more than one rational
19 interpretation, the court may not substitute its judgment
20 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
21 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,
22 599 (9th Cir. 1999).

23 The ALJ is responsible for determining credibility,
24 resolving conflicts in medical testimony, and resolving
25 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
26 Cir. 1995). The ALJ's determinations of law are reviewed
27 *de novo*, although deference is owed to a reasonable
28 construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

21 SEQUENTIAL PROCESS

22 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
23 requirements necessary to establish disability:

24 Under the Social Security Act, individuals who are
25 "under a disability" are eligible to receive benefits. 42
26 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
27 medically determinable physical or mental impairment"
28 which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."

1 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
2 from "anatomical, physiological, or psychological
3 abnormalities which are demonstrable by medically
4 acceptable clinical and laboratory diagnostic techniques."
5 42 U.S.C. § 423(d)(3). The Act also provides that a
6 claimant will be eligible for benefits only if his
7 impairments "are of such severity that he is not only
8 unable to do his previous work but cannot, considering his
9 age, education and work experience, engage in any other
10 kind of substantial gainful work which exists in the
11 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
12 the definition of disability consists of both medical and
13 vocational components.

14 In evaluating whether a claimant suffers from a
15 disability, an ALJ must apply a five-step sequential
16 inquiry addressing both components of the definition,
17 until a question is answered affirmatively or negatively
18 in such a way that an ultimate determination can be made.
19 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
20 claimant bears the burden of proving that [s]he is
21 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
22 1999). This requires the presentation of "complete and
23 detailed objective medical reports of h[is] condition from
24 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
25 404.1512(a)-(b), 404.1513(d)).

26 It is the role of the trier of fact, not this court, to resolve
27 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
28 supports more than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner. *Tackett*, 180
F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
Nevertheless, a decision supported by substantial evidence will
still be set aside if the proper legal standards were not applied in
weighing the evidence and making the decision. *Browner v. Secretary*
of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1988). If
there is substantial evidence to support the administrative
findings, or if there is conflicting evidence that will support a
finding of either disability or non-disability, the finding of the
Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-

1 1230 (9th Cir. 1987).

2 **STATEMENT OF FACTS**

3 The facts of the case are set forth in detail in the transcript
4 of proceedings and are briefly summarized here. Plaintiff was 44
5 years old at the time of the administrative hearing. (Tr. 24.) He
6 had a tenth-grade education and had not obtained his high school
7 equivalency degree. (Tr. 25.) He had past work experience as a
8 cook and home attendant. Plaintiff, who had a history of alcohol
9 abuse and treatment, testified he lived in a group transitional
10 housing with four other adult males. He reported he did his own
11 cooking and household chores, and spent the day reading or playing
12 with the dog, or having Bible study with friends. (Tr. 29-31.) He
13 testified he could no longer work due to stress and back pain that
14 caused swelling in his low back and numbness in his hands and feet.
15 He said he could not lift more than five to ten pounds, he could
16 stand no more than five to ten minutes, walk a block and sit for
17 about 20 minutes to a half hour before he had to get up and move.
18 (Tr. 31.) He stated he also had diabetes that he treats with
19 insulin. (Tr. 34-35.)

20 **ADMINISTRATIVE DECISION**

21 At step one, the ALJ found Plaintiff had not engaged in
22 substantial gainful activity since the alleged onset date. At step
23 two, he found Plaintiff had severe impairments of depression,
24 borderline intellectual functioning, personality disorder and
25 degenerative disc disease of the lumbar spine. (Tr. 12.) At step
26 three the ALJ found these impairments did not meet or equal one of
27 the listed impairments in the Regulations. (Tr. 13.) In his step
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1 four findings, ALJ found Plaintiff's statements regarding symptoms
2 and limitations were not entirely credible. (Tr. 15-18.) He
3 assessed Plaintiff's residual functional capacity (RFC) as the
4 capacity to perform light work with an ability to change position
5 every 45 minutes; Plaintiff should avoid climbing ladders, ropes and
6 scaffolding, and he would be capable performing multi-step tasks
7 requiring few academic demands, having only superficial public
8 contact and "working around others in positions not requiring a high
9 degree of cooperation." (Tr. 15.) Based on VE testimony, the ALJ
10 found Plaintiff could not perform his past work. (Tr. 18.) The ALJ
11 proceeded to step five and found there were other jobs in the
12 national economy (sedentary and light) that Plaintiff could perform;
13 therefore he was not "disabled" as defined by the Social Security
14 Act through the date of the decision. (Tr. 19-20.)

15 **ISSUES**

16 The question presented is whether there was substantial
17 evidence to support the ALJ's decision denying benefits and, if so,
18 whether that decision was based on proper legal standards.
19 Plaintiff contends the ALJ erred when he (1) improperly evaluated
20 the medical evidence; (2) improperly rejected his credibility; (3)
21 presented an incomplete hypothetical to the vocational expert. (Ct.
22 Rec. 18.)

23 **DISCUSSION**

24 **A. Rejection of Examining Psychologist Opinions**

25 Although the ALJ found Plaintiff had the severe mental
26 impairments of borderline intelligence functioning (BIF),
27 personality disorder, and depression (Tr. 12), he rejected the
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1 opinions of examining psychologist Kayleen Islam-Zwart, Ph.D., that
2 these impairments caused moderate and marked limitations in
3 cognitive and social functioning, and gave greater weight to the
4 opinions of a non-examining psychologist. (Tr. 17.) Plaintiff
5 argues this was error requiring remand.

6 The record contains a March 2006 psychological evaluation in
7 which Dr. Islam-Zwart opined Plaintiff met the criteria for
8 Borderline Intelligence Functioning with a full-scale IQ of 75.
9 (Tr. 148-155.) This diagnosis appears to be based on scores noted in
10 a psychological evaluation form completed in 2002 and included in
11 the record. (Tr. 121-24.) Although Dr. Islam-Zwart did not
12 administer an independent intelligence test, she administered
13 several objective psychological tests, as well as a mental status
14 exam and interview. (Tr. 152-55.) The record shows Plaintiff's
15 mental control tested within normal limits. The results of the
16 Trail Marking Test (Trails A and B), which measures simple and
17 complex attention abilities and "is sensitive to the effects of
18 brain impairment," showed moderate to severely impaired performance;
19 and the memory malingering test did not indicate malingering of
20 memory problems. (Tr. 153.) A Personality Assessment Inventory
21 (PAI) was also administered.¹ (Tr. 154.) Dr. Islam-Zwart interpreted
22 the PAI results as showing some inconsistent results, some attempts
23 to portray a negative impression in certain areas, and impairments

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25 ¹ According to Dr. Islam-Zwart, the PAI "is a standardized
26 clinical personality inventory that assesses emotional adjustment."
27 (Tr. 154.)

1 in functioning, which she summarized in the attached
2 psychological/psychiatric evaluation form. (Tr. 149-50.)
3 Specifically, the test results showed impairments in concentration
4 and thinking. (Tr. 154.) She concluded Plaintiff's depression and
5 cognitive deficits "were likely to interfere with his ability to
6 initiate and maintain employment." (Tr. 155.)

7 In his credibility findings, the ALJ found Plaintiff's
8 subjective symptom allegations were unsupported by the medical
9 evidence. (Tr. 17.) He reasoned Plaintiff had worked for 20 years
10 as a chef with his mental impairments and he reported to his
11 providers that his depression "was improving with medication."
12 (*Id.*) The ALJ relied on the opinions of agency psychologist, James
13 Bailey, Ph.D., who did not examine Plaintiff, but based his opinions
14 on his review of the 2002 report and Dr. Islam-Zwart's evaluation.
15 (Tr. 17, 170, 174.) The ALJ relied upon Dr. Bailey's non-examining
16 opinion "due to his expertise, his familiarity with the Social
17 Security regulations and the consistency of his testimony with the
18 longitudinal medical history, objective findings, or lack thereof,
19 and other medical opinions contained in the record." This finding
20 is not supported by substantial evidence, and the ALJ's evaluation
21 of the psychological evidence is based on legal error.

22 It is well-settled that in determining disability, the ALJ must
23 evaluate the medical evidence submitted and explain the weight given
24 to the opinions of accepted medical sources² in the record. The
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26 ² Acceptable medical sources for purposes of disability
27 proceedings include licensed or certified psychologists. 20 C.F.R.
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1 regulations distinguish among the opinions of three types of
2 accepted medical sources: (1) sources who have treated the claimant;
3 (2) sources who have examined the claimant; and (3) sources who have
4 neither examined nor treated the claimant, but express their opinion
5 based upon a review of the claimant's medical records. 20 C.F.R. §
6 416.927. Here, Dr. Islam-Zwart is an examining psychologist, and
7 her opinions carry more weight than those of Dr. Bailey, a non-
8 examining reviewing psychologist. See *Benecke v. Barnhart*, 379 F.3d
9 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th
10 Cir. 1995). "As is the case with the opinion of a treating
11 physician, the Commissioner must provide 'clear and convincing'
12 reasons for rejecting the uncontradicted opinion of an examining
13 physician." *Lester*, 81 F.3d at 830 (citation omitted). If the
14 opinion is contradicted, it can only be rejected for "specific" and
15 "legitimate" reasons that are supported by substantial evidence in
16 the record. *Andrews*, 53 F.3d at 1043.

17 Historically, the courts have recognized conflicting medical
18 evidence, incongruity between the doctor's opinions and his own
19 treatment notes and objective data, the absence of regular medical
20 treatment during the alleged period of disability, and the lack of
21 medical support for doctors' reports based substantially on a
22 claimant's subjective complaints as specific, legitimate reasons for
23 disregarding the treating physician's opinion. *Tommasetti v.*
24 *Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008); *Flaten v. Secretary of*
25 *Health and Human Services*, 44 F.3d 1453, 1463-64 (9th Cir. 1995);

26
27 _____
28 §§ 404.1513, 416.913.

1 *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989).

2 Although the opinion of a non-examining physician may be
3 accepted as substantial evidence, that opinion must be supported by
4 and consistent with other medical evidence in the record. *Andrews*,
5 53 F.3d at 1043; *Lester*, 81 F.3d at 830-31. The opinion of a
6 nonexamining physician cannot by itself constitute substantial
7 evidence that justifies the rejection of the opinion of either an
8 examining physician or a treating physician. *Lester*, 81 F.3d at 831
9 (*citing Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990)).

10 Cases have upheld rejection of an examining or treating physician
11 based *in part* on the opinions of a nonexamining medical advisor; but
12 those cases have also found reasons to reject the opinions of
13 examining and treating physicians that were independent of the
14 nonexamining doctor's opinion. *Lester*, 81 F.3d at 831 (*citing*
15 *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989) (reliance
16 on laboratory test results, contrary reports from examining
17 physicians and testimony from claimant that conflicted with treating
18 physician's opinion)); *Andrews*, 53 F.3d at 1043 (conflict with
19 opinions of five nonexamining mental health professionals, testimony
20 of claimant and medical reports); *Roberts v. Shalala*, 66 F.3d 179
21 (9th Cir 1995) (rejection of examining psychologist's functional
22 assessment which conflicted with his own written report and test
23 results). Thus, case law requires not only an opinion from the non-
24 examining medical source, but also substantial evidence independent
25 of that opinion which supports the rejection of contrary conclusions
26 by examining or treating physicians. *Andrews*, 53 F.3d at 1039.

27 Dr. Islam-Zwart's opinions were supported by objective
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1 psychological testing and a prior psychological report that
2 substantially supported Dr. Islam-Zwart's findings.³ The ALJ did not
3 give "clear and convincing" or "specific and legitimate" reasons for
4 rejecting her interpretation of the objective testing and her
5 assessment of functional limitations. Further, the ALJ's reliance
6 on Dr. Bailey's opinions is error, as neither other medical evidence
7 in the record, nor inferences drawn, support Dr. Bailey's conclusory
8 and brief assessment. Thus, without the support of other medical
9 evidence, Dr. Bailey's opinions cannot be accepted as substantial
10 evidence. *Lester*, 81 F.3d at 831. The ALJ's improper rejection of
11 the examining psychologist's opinions is cause for remand.

12 **B. Further Development of the Record**

13 An ALJ's duty to develop the record is triggered when there is
14 ambiguous evidence or when the record is inadequate for proper
15 evaluation of evidence. 20 C.F.R. § 416.945(a)(3); *Mayes v.*
16 *Massanari*, 276 F.3d 453, 459-60 (9th Cir 2001); *Tonapetyan v. Halter*,
17 242 F.3d 1144, 1150 (9th Cir. 2001). The failure to do so is legal
18 error requiring remand. *Lester*, 81 F.3d at 830.

19 Here, the record is inadequate to assess Plaintiff's mental
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21 ³ It is noted on independent review that the 2002 psychological
22 evaluation form references a narrative report that is not in the
23 record before this court. Therefore, the BIF diagnosis is not
24 supported by test results or further explanation by an acceptable
25 medical source. On remand, new intellectual functioning testing
26 should be administered by the consultative medical examiner to
27 substantiate the diagnosis of BIF.
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1 impairments and the severity of his functional limitations. In
2 addition, the record does not contain substantial evidence to
3 support the step two findings. *Richardson*, 402 U.S. at 400
4 (substantial evidence is relevant evidence a reasonable mind might
5 accept as adequate to support a conclusion). Specifically, the BIF
6 diagnosis presented is unsupported by objective medical evidence,
7 test results or clinical notes, and the conflict between Dr.
8 Bailey's assessment and Dr. Islam-Zwart's report presents ambiguity
9 that requires a full consultative psychological examination, with
10 objective testing, to assess cognitive functioning and limitations
11 caused by medically determinable impairments. See 20 C.F.R. §§
12 416.908, .945.

13 Because the ALJ's credibility findings were based, in part, on
14 the ALJ's improper evaluation of inadequate psychological evidence,
15 consideration of a new psychological examination based on medically
16 acceptable diagnostic techniques, medical expert testimony if
17 warranted, and new credibility findings are necessary on remand.
18 Further, caution is directed against inferences from Plaintiff's
19 inconsistent statements regarding psychological symptoms or mental
20 health treatment or failure to pursue counseling and medication for
21 his psychological impairments. *Orn v. Astrue*, 495 F.3d 625, 638 (9th
22 Cir. 2007); *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996);
23 SSR 96-7p.

24 **C. Remedy**

25 Plaintiff requests the ALJ's decision be reversed and he be
26 found entitled to benefits. (Ct. Rec. 17 at 17.) However, where as
27 here, the record has not been fully developed, there are outstanding
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1 issues that need to be resolved, and it is not clear from the record
2 that Plaintiff is disabled, remand for additional proceedings is
3 appropriate. *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000)
4 (*citing Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)).
5 Accordingly,

6 **IT IS ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
8 **GRANTED** and the above captioned case is remanded to the Commissioner
9 for additional proceedings pursuant to sentence four, 42 U.S.C. §
10 405(g).

11 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
12 **Rec. 19**) is **DENIED**.

13 3. Application for attorney fees may be made by separate
14 motion.

15 The District Court Executive is directed to file this Order and
16 provide a copy to counsel for Plaintiff and Defendant. The file
17 shall be **CLOSED** and judgment entered for **Plaintiff**.

18 DATED October 5, 2009.

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20 S/ CYNTHIA IMBROGNO
21 UNITED STATES MAGISTRATE JUDGE
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